

### **DETAILED ACTION**

1. This action is in response to the remarks received on December 30, 2009.

#### ***Continued Examination Under 37 CFR 1.114***

2. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on December 30, 2009 has been entered.

#### ***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

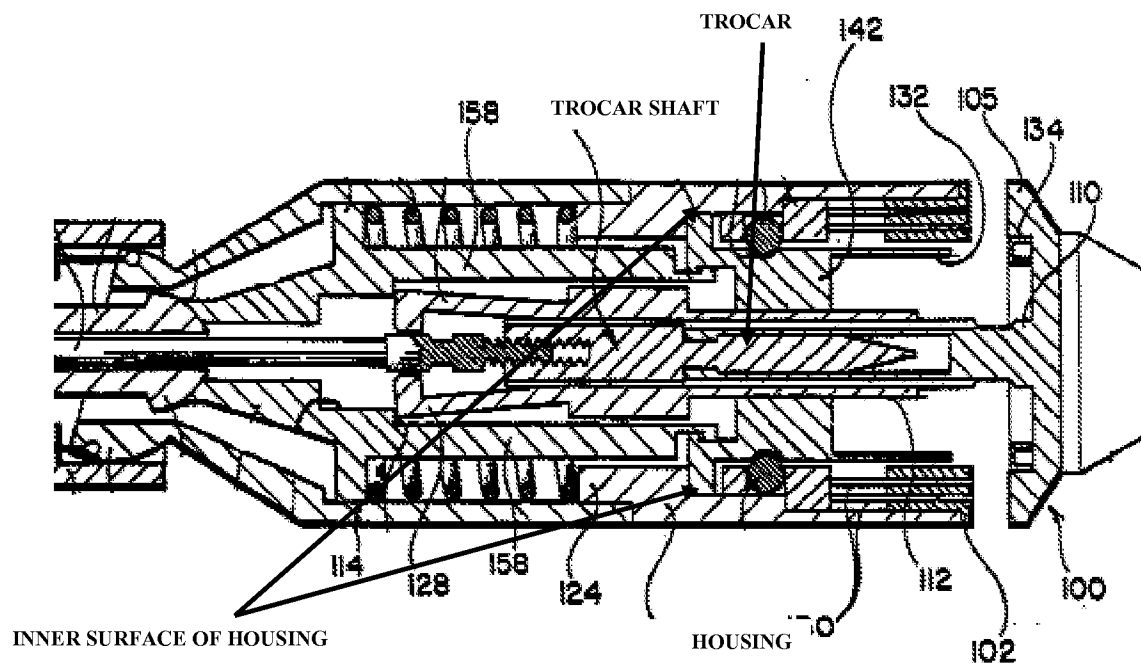
(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 100-104 and 106-110 are rejected under 35 U.S.C. 103(a) as being unpatentable over Grant et al. (USPN 5,609,285) in view of Toledano (USPN 5,855,312).

In reference to claims 100-104 and 106-110, Grant et al. discloses a surgical device, comprising: a staple housing 104 receiving a stapler cartridge 102, the housing 104 having an inner surface defining a bore (*see diagram of Grant et al. figure 18 below*) ; a rim 112 extending radially inward from the inner surface 124 of the housing 104 (figure 9-column 11 lines 49-52); a trocar

Art Unit: 3721

shaft 206 disposed through the bore of the housing 104 and extends distally<sup>1</sup> relative to a clamping face (figures 6-7), so as to be moveable relative to the housing 104 by operation of at least one driver 84 by a first rotatable drive shaft 96, wherein the at least one driver 84 is within the housing 104; and an anvil 100 attachable to the trocar shaft 206 and configured to be



moveable relative to the housing by movement of the trocar shaft, wherein the anvil 100 includes an anvil face 105 and an anvil sleeve 110 defining a trocar receiving slot (*see figure 34 diagram of Grant et al. below*) and the anvil sleeve 110 having a circumferential recess (defined by 111 segments-figure 34) receiving portion 113 of the rim 112 (column 13 line 64- column 14 line 14); and a second driver 85 operable a second rotatable drive shaft 92 to drive staples from the staple housing 104.. Grant et al. does not disclose the trocar shaft to include a flexible portion.

<sup>1</sup> **dis-tal** (dɪsˈtɑːl) *adj.* **1.** Anatomically located far from a point of reference, such as an origin or a point of attachment. (American Heritage Dictionary)

Art Unit: 3721

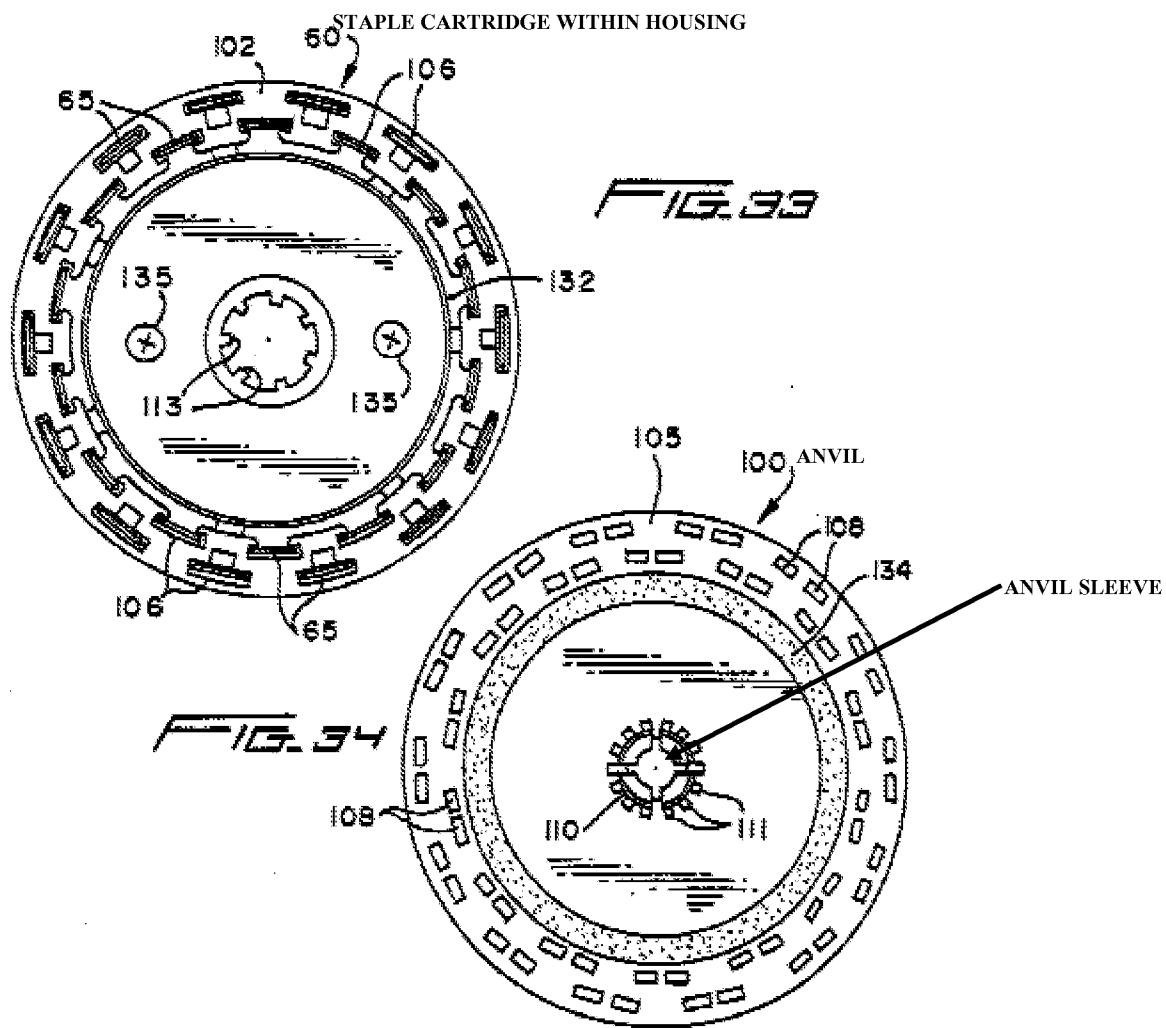


Figure 1 and column 3 line 65- column 6 line 59 of Toledano teaches a surgical device, comprising: a staple housing defining a bore; a trocar shaft disposed through the bore of the housing and extends distally<sup>2</sup> relative to a clamping face, so as to be moveable relative to the housing by operation of at least one driver within the housing; and an anvil attachable to the trocar shaft and configured to be moveable relative to the housing by movement of the trocar

Art Unit: 3721

shaft, wherein the anvil includes an anvil shaft 140, the anvil shaft defining a trocar receiving slot, and the trocar shaft including a flexible trocar 22 configured to be insertable within the trocar receiving slot and the trocar receiving slot is defined in an anvil sleeve 16 having an axially-extending bore in communication with the trocar receiving slot, wherein the axially-extending bore has a wide portion into which the flexible trocar is insertable and a narrow portion which retains the trocar 22 within the axially-extending bore. It would have been obvious to one having ordinary skill in the art at the time of the invention to modify the trocar shaft of Grant et al. to include a flexible portion, since column 4 lines 4-17 of Toledano states that such a modification improves the surgical conditions of closed surgery by enabling accurate alignment of a staple housing and anvil.

5. Claim 105 is rejected under 35 U.S.C. 103(a) as being obvious over Grant et al. (USPN 5,609,285) in view of Toledano (USPN 5,855,312) as applied to claim 108 above, and further in view of Whitman (USPN 6,491,201).

Regarding claim 105, the modified apparatus of Grant et al. discloses a surgical instrument having a first driver and a second driver, each respectively manually actuated via a first and second drive shaft; but Grant et al. does not disclose controlling rotation of each driver with a motor. Whitman teaches a surgical instrument having a flexible shaft (215) movable relative to a housing (155) by way of a rotatable driver (170) selectively rotated by at least one motor (165) via a controller (160). It would have been obvious to one having ordinary skill in the art at the time of the invention to modify the surgical instrument of Toledano include the

---

<sup>2</sup> **dis·tal** (dɪsˈtɪl) *adj.* **1.** Anatomically located far from a point of reference, such as an origin or a point of attachment. (American Heritage Dictionary)

Art Unit: 3721

motor rotatable driver of Whitman, as column 3 lines 17-31 of Whitman states that such a modification allows an operator to selectively and automatically control rotation of the driver.

Furthermore, It has been held that broadly providing a mechanical or automatic means to replace manual activity which has accomplished the same result involves only routine skill in the art.<sup>3</sup>

### ***Response to Arguments***

6. Applicant's arguments with respect to claims 100 and 102-110 have been considered but are moot in view of the new ground(s) of rejection. Although Examiner has once again applied Grant et al. as the primary reference in the 35 U.S.C. 103(a) rejection of claims 100 and 102-110, an alternative interpretation of the structure disclosed by Grant et al. has been presented. In light of the amendments filed, Examiner has identified element 104 as the housing as claimed rather than element 114, and element 110 as the anvil sleeve rather than element 105.

### ***Conclusion***

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to GLORIA R. WEEKS whose telephone number is (571)272-4473. The examiner can normally be reached on M-Th 8am-6:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rinaldi I. Rada can be reached on (571) 272-4467. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

---

<sup>3</sup> *In re Venner*, 120 USPQ 199.

Art Unit: 3721

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Other helpful telephone numbers are listed for applicant's benefit:

- Allowed Files & Publication (888) 786-0101
- Assignment Branch (800) 972-6382
- Certificates of Correction (703) 305-8309
- Fee Questions (571) 272-6400
- Inventor Assistance Center (800) PTO-9199
- Petitions/special Programs (571) 272-3282
- Information Help line 1-800-786-9199

/Gloria R. Weeks/  
Examiner, Art Unit 3721

/Rinaldi I Rada/  
Supervisory Patent Examiner, Art Unit  
3721

January 19, 2010